FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 2 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 124

NORVEL H. LILLY,
Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

H. VICTOR SPIKE,
SILAS H. STRAWN,
HAROLD A. SMITH,
For Respondent.

THE DARTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Argument	6
I. The Jury Found, After a Full and Fair Trial, That There Was No Violation of the Safety Appliance Act	6
II. Under Countless Decisions in the Federal Courts, In Illinois and in Other States the Rule Is Well Established That After a Reversal in the Courts of Review on One Issue, A Party Will Not Be Permitted Thereafter to Advance a New Issue to Sustain a Judgment	7
III. There Was No Violation of the Boiler Inspection Act or the Safety Appliance Act Merely Because of Ice on the Deck of the Tender	10
IV. The Amendment of August 11, 1939, Was Not Retroactive	14
V. There Is No Evidence in the Record to Support a Finding of Negligence on Behalf of the Defendant	19
VI. After the Verdict Establishing Petitioner's Perjury There Was Nothing in the Record to Sustain the Charges of the Complaint	20
Conclusion	21
Statement of the case	1

Table of Authorities Cited.

C. R. I. & P. Ry. Co. v. Benson, 352 Ill. 195, 200 12
Chew Heong v. United States, 112 U. S. 536, 559 17
Davis v. Ill. Collieries, 232 Ill. 284 10
Ford v. N. Y., N. H. & H. R. Co., 54 Fed. (2d) 342, 344 11
Gascoigne v. Met. El. Ry., 239 Ill. 18 10
Great Northern R. Co. v. Johnson, 207 Fed. 521 21
Harlan v. Wabash Ry. Co., 73 S. W. (2d) 749, 752, 753 12
Hatton v. N. Y., N. H. & H. R. Co., 261 Fed. 667 20
Illinois Central R. Co. v. Egan, 203 Fed. 937, 939 9
Lesser Cotton Co. v. St. L. I. M. & S. Ry. Co., 114 Fed. 133 10
Murray v. Gibson, 56 U. S. 421, 423 15
McEwen v. Den, 65 U. S. 242, 244 16
Missouri Pacific v. Aeby, 275 U. S. 426 20
Missouri Pacific v. Lane, 56 S. W. (2d) 175 20
M. K. & T. Ry. Co. v. Wilhoit, 160 Fed. 440, 443 9
Reeves v. Chicago, St. P., M. & O. Ry. Co., 179 N. W. 689, 690 11
Riley v. Wabash Ry. Co., 44 S. W. (2d) 136, 141 13
San Juan Light Co. v. Requena, 224 U. S. 89, 96, 97 .. 7
Snyder v. Snyder, 142 Ill. 60, 67 8
Sohn v. Waterson, 84 U. S. 596, 598, 599 16
Slater v. Chicago, St. P., M. & O. Ry. Co., 178 N. W. 813, 814 12
Schilling v. D. & H. R. Co., 114 F. (2d) 69 21
Thompson v. Hocking Valley Ry. Co., 45 F. (2d) 155 .. 7
Tobin v. Detroit, T. & I. R. Co., 13 N. E. (2d) 739, 744 21
United States v. St. Louis, etc., Ry. Co., 270 U. S. 1, 3 18
United States v. Heth, 3 Cranch 399, 413 15
Winfree v. Northern Pacific, 227 U. S. 296 14
Wichita Falls & S. R. Co. v. Wade, 57 S. W. (2d) 332 20

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 124.

NORVEL H. LILLY,

Petitioner.

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

Petitioner's statement of the case (Pet. 1-5) is inaccurate and misleading in the respects hereinafter stated.

They state (Pet. 2) that "the Illinois Courts refused to apply the provisions of the Safety Appliance Act" and that those courts refused to apply Rule 153 of the Interstate Commerce Commission. The complaint charged (R. 3) that the defendant:

> (a) Negligently supplied a defective hook with which the plaintiff pulled the water spout over the tender;
>
> (b) That the defendant negligently supplied a water spout which was defective.

Petitioner's counsel voluntarily dismissed paragraphs (a) and (b) at the close of Petitioner's case (R. 84). The following three charges of negligence on which the case went to the jury are set forth verbatim as they appeared in the complaint (R. 4):

"(c) The defendant did carelessly, negligently, wrongfully and unlawfully furnish the plaintiff with a place to work and require the plaintiff to work at a place, in the performance of his duties as employee, which place was unsafe and dangerous to human safety in that the defendant required the plaintiff, in the performance of his duties, to stand and be upon the engine tank described heretofore for the purpose of moving the water spout over to the engine tank to supply water to this engine tank, yet the defendant carelessly, negligently and wrongfully allowed, caused and permitted ice to be, remain and accumulate on this engine tank at the place where it required plaintiff to so work in the performance of his duties, with great danger to plaintiff; and of these facts the defendant had due notice, and by and through such careless, negligent and wrongful conduct on the part of the defendant, plaintiff, while he was in the performance of his duties as employee of this defendant, attempting to move the water spout in position over the tank, was by reason of the ice on the tank caused to slip and fall and lose his balance, and was caused to be thrown, drop off the engine tank to the ground, and sustain serious injuries.

(d) (R. 5) Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that the defendant required, caused and permitted plaintiff to work on the tender of the locomotive of his train on the occasion above charged; in the act of putting water in the tender of the locomotive, this tender was unsafe because the top where the plaintiff was required to work was

slippery and covered with ice and other slippery materials to endanger his life or limb, and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition on top of the tender and was thrown and caused to fall and be seriously injured.

(e) (R. 8) Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard, Michigan, a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the defendant did operate this locomotive and tender with the tender of this locomotive at the part where the water is supplied to and poured into the locomotive to be cracked, worn and split; so as to occasion and permit the leaking of water from and through this crack, hole and aperture and to flood, seep and cover the top of the tender where plaintiff was required to be in the performance of his duties as employee, rendering it likely and liable for the water to freeze and cause a dangerous condition, and thereby, by reason of this violation on the part of the defendant of this Federal Safety Appliance Act, the water in this tender did leak through this defective place onto the top of the tender, and did freeze, and it thereby caused plaintiff, while he was so at work, as above charged, on the top of this tender, to slip and be thrown and seriously injured."

The trial court permitted all witnesses to be examined on direct and cross-examination as to whether there was a leak or crack in the tender.

The plaintiff testified (R. 27):

"I noticed water on that tender this day (the day before the accident). I noticed water leaking on this engine, that there was water coming from some place on this engine.

'Q. Tell us exactly what you saw about that?

A. Well, in front of the manhole where the—that is the hole that the spout is put down into to take

the water, right at the seam on top of the tender where the two join together, there was water coming out of there, at the front of this manhole, right at the seam.'

"It was coming out in a stream, not a big stream, just a small stream like spurting out and spreading over the tender. The manhole is about fifteen or eighteen inches wide and about ten to twelve inches high, about three feet long. The stream of water was coming out from the seam right in front of the manhole, right where the manhole and the top of the tender is riveted together; it was right at the seam, where the two join. It was a very small stream, I will say about like a small nail."

At the conclusion of all the evidence, *at the request of plaintiff's counsel* (R. 175) the Court instructed the jury as follows (R. 177):

"Plaintiff makes several charges in his complaint. One charge is that the defendant unlawfully violated an Act of Congress relating to locomotive engines known as a Safety Appliance Act: He charges that defendant used on this occasion a locomotive and tender which was in improper condition and unsafe because at a place on the tender where water is supplied, it was cracked, worn and split so as to occasion and permit water leaking from this crack to flood, seep and cover the top of the tender, rendering it likely to freeze, and that such water did freeze on the top of the tender where plaintiff was so at work, and that he was thereby caused to slip and be thrown."

In the closing argument petitioner's counsel dramatically concluded the arguments in the case by saying (R. 169):

"So, as I say, gentlemen, don't find that there was no leak, or you put him out of court."

The jury were specifically interrogated and answered as follows (R. 169):

"Interrogatory No. 1: Was there, at the time of the accident in question, a leak in or near the manhole collar on the tender in question?

Answer: No."

The trial, as stated by Petitioner (Pet. 6), was fair and impartial and under instructions that admittedly expressed correct principles of law.

No court in Illinois was ever asked by the Petitioner to apply the provisions of Rule 153 of the Interstate Commerce Commission until the petition for rehearing was filed in the Appellate Court of Illinois (R. 203).

On the charge of a violation of the Safety Appliance Act as set forth in Petitioner's complaint it is to be seen that the courts have given full consideration to such charge. What counsel for Petitioner mean to say is that after the Appellate Court found against them they sought to switch the issue and inject into the case a claimed violation of Rule 153 (a) and (b) of the Interstate Commerce Commission and that the Appellate and Supreme Courts of Illinois have refused to permit that to be done.

On page 4 of the petition counsel say that the ice was not deposited on the tender by natural causes. As appears herein, only one issue was tried. That was whether the ice came upon the tender because of a leak or crack in the tender as charged in the complaint, paragraphs (c), (d) and (e), as was testified to by the plaintiff and as argued by counsel. The only reference in the case anywhere as to the other possible sources of the water and the consequent ice was purely by speculation made in argument of counsel objecting to the injection into the case on appeal of new issues. (Exhibits, page 4 of Answer of Respondent in Supreme Court of Ill.)

ARGUMENT.

I.

The Jury Found, After a Full and Fair Trial, That There Was No Violation of the Safety Appliance Act.

As is to be seen from the pleadings, the evidence, the arguments of counsel and the charge to the jury submitted at the request of Petitioner's counsel, the only testimony offered was with respect to a violation of the Safety Appliance Act in that there was a leak or crack in the tender near the water hole. After a full and fair trial, the jury found there was no such crack or leak. We submit counsel's statement (Rec. 14) to the effect that the issue as to whether ice alone constituted a violation of the Act was submitted to the jury is not supported by the record.

It was only in desperation that they brought a new issue into the case when they alluded in their petition for rehearing to Rule 153 of the Interstate Commerce Commission. We do not dispute that the Interstate Commerce Commission has the right to adopt the rules referred to. That the reference to the rules was purely an afterthought is readily apparent when Rule 153 is read in connection with the instruction to the jury, prepared and submitted by Petitioner, as to what the issues were under the Safety Appliance Act.

The courts, of course, will take judicial notice of the rules of the Interstate Commerce Commission but they do not apply them to a case unless an issue is raised respecting those rules. The purpose of the pleadings is to advise the parties of the issue they are to meet so that they can defend themselves when brought into court. We submit it needs the citation of no authority that one case

may not be stated in a pleading and an entirely different one advanced in the courts of review.

The case of *Thompson* v. *Hocking Valley Ry. Co.*, 45 F. (2d) 155, relied upon by counsel (Pet. p. 17) was one in which the complaint and the facts largely stated a cause of action under the Boiler Inspection Act. The Court said in that regard:

> "It is now apparent that the petition's claim for relief, 'under the Federal Employers' Liability Act and the amendments thereto,' and the stated facts in the petition, went far toward making a case under the Boiler Inspection Act (45 USCA § 22 *et seq.*); indeed, the defect charged pertained wholly to a locomotive boiler and its connections."

The Court in that case recognized that, the parties not having tried the case on the theory of a violation of the Boiler Inspection Act, the record was in no condition for the Court to pass upon the question of such a violation. (Opinion, p. 156.) So we contend here that we ought not to be required to meet the issue as to a violation of the rules of the Interstate Commerce Commission inasmuch as that issue was not tried.

II.

Under Countless Decisions in the Federal Courts, in Illinois and in Other States the Rule Is Well Established That After a Reversal in the Courts of Review on One Issue, a Party Will Not Be Permitted Thereafter to Advance a New Issue to Sustain a Judgment.

May we call your attention to the following cases:

San Juan Light Co. v. *Requena*, 224 U. S. 89. On pages 96 and 97 of the opinion the court said:

> "It is urged that the negligence charged in the complaint related only to the condition of the wiring *inside* the residence of the deceased, and therefore that

the court erred in permitting a recovery on the theory that the defendant was negligent in respect of the maintenance and care of the wires and converters *outside*. This contention must fail. While the complaint was not drafted with commendable precision, and, if critically examined, might be regarded as leaving it uncertain whether the negligence charged related to the wiring inside or to that outside whereby the current was supplied, there was no objection to this uncertainty in the court below. On the contrary, the trial proceeded, as we have seen, upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of a variance. Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review." (Italics ours.)

Snyder v. *Snyder*, 142 Ill. 60. In that case proceedings were instituted to have a conservator appointed for an insane person. In the trial court the case was tried upon the theory that the question was whether the defendant had sufficient mental capacity to transact ordinary business, whereas, under the statute, the question was whether the person was possessed of "sufficient mental capacity to care for and manage his estate." The court was asked to reverse the case because of this error. On page 67 of the opinion the court said:

"Several other instructions given for the defendant announced the same principle in a different form. In view of the instructions given for the defendant at her request, if the theory upon which the court proceeded was not the correct one, it having been adopted

at the request of the defendant, she can not now complain of the action of the court. *Calumet Iron and Steel Co.* v. *Martin*, 115 Ill. 358; *Illinois Central Railroad Co.* v. *Latimer*, 128 id. 163."

Illinois Central R. Co. v. *Egan*, 203 Fed. 937, (C. C. A. 8th). On page 939 of the opinion the court said:

"It is claimed in this court for the first time that the court below erred in holding that this cause is not one arising under the national Employer's Liability Act but under the state statutes of Iowa. Whether this was error it is unnecessary to determine in this action, as this objection was not made by the defendant in the court below, but, on the contrary, it insisted at every stage of the proceeding, from the time the motion to remand was filed until the close of the trial, that the cause was not one arising under the act of Congress but under the Iowa statutes. Therefore, even if it was error, which we do not decide, the defendant having invited it, and induced the court to commit it, it cannot now be heard to complain. *New York Elevated R. R. Co.* v. *Fifth National Bank*, 135 U. S. 432, 441, 10 Sup. Ct. 743, 34 L. Ed. 231; *Walton* v. *Chicago, etc., Ry. Co.*, 56 Fed. 1006, 1008, 6 C. C. A. 223, 225; *Chase* v. *Driver*, 92 Fed. 780, 786, 34 C. C. A. 668, 674; *Mechanics' Insurance Co.* v. *C. A. Hoover Distilling Co.*, 182 Fed. 590, 593, 105 C. C. A. 128, 131, 31 L. R. A. (N. S.) 873.

Nor is it permissible for one who tries his case upon one theory to change his position in the appellate court and ask for a reversal upon another and inconsistent theory. *New York, etc. Ry. Co.* v. *Estill*, 147 U. S. 591, 614, 13 Sup. Ct. 444, 37 L. Ed. 292; *Lesser Cotton Co.* v. *St. L., I. M. & S. Ry. Co.*, 114 Fed. 133, 142, 52 C. C. A. 95, 104; *Chicago, etc., Ry. Co.* v. *Voelker*, 126 Fed. 522, 529, 65 C. C. A. 226, 233, 70 L. R. A. 264; *Missouri, etc., Ry. Co.* v. *Wilhoit*, 160 Fed. 440, 443, 87 C. C. A. 401, 404."

M. K. & T. Ry. Co. v. *Wilhoit*, 160 Fed. 440, (C. C. A. 8th). The action instituted was to recover damages for personal injuries received by the plaintiff as a section

man in defendant's employ. The trial resulted in a judgment for the plaintiff, and while the judgment was reversed on other grounds, the court said on page 443 of the opinion:

> "We come next to several assignments predicated upon instructions refused, and others given, bearing upon the question, whether the plaintiff has assumed the risk of injury incident to his continued use of the defective car. The Court of Appeals was of opinion that this defense was not available to the defendant because it was not affirmatively pleaded in the answer. But the question of pleading thus suggested was not raised upon the trial. On the contrary, as the record discloses, each of the parties, without objection from the other, introduced testimony addressed to the question of the plaintiff's assumption of the risk, both presented requests for instructions bearing thereon, and the court charged the jury upon that subject. *We must, therefore, give effect to the settled rule, that when the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court of review.*" (Italics ours.)

See also:

Lesser Cotton Co. v. *St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, (C. C. A. 8th).

Davis v. *Ill. Collieries*, 232 Ill. 284.

Gascoign v. *Met. El. Ry.*, 239 Ill. 18.

III.

There Was No Violation of the Boiler Inspection Act or the Safety Appliance Act Merely Because of Ice on the Deck of the Tender.

The jury found that mechanically there was nothing wrong with the tender or water tank. The presence of ice upon the deck of the tender had nothing to do with

its mechanical operation. This did not constitute a defect within the meaning of the Safety Appliance Act or the Boiler Inspection Act. In the case of *Ford* v. *N. Y.; N. H. & H. R. Co.*, 54 F. (2d) 342 (C. C. A. 2d), in which certiorari was denied, 285 U. S. 549, the evidence showed that there was grease on the handhold of one of the grab irons on the locomotive. In all other respects the locomotive was in good working condition. The Court held that this did not constitute a violation of the two Acts mentioned and in so doing said on page 344 of the opinion:

> "An examination of the debates in Congress on the passage of these acts, shows no intention by Congress to impose civil liability for a condition occurring during the operation of the train which does not affect the construction and maintenance as required by the Safety Appliance Act. 61st Congress, 2d Session, Senate Documents, 446; 52d Congress, vol. 23, Congressional Record, pp. 592-5; volume 24, pp. 1273-1287; Senate Committee Report, vol. 24, Congressional Record, pp. 1246-1251."

Reeves v. *Chicago, St. P., M. & O. Ry. Co.*, 179 N. W. 689 (147 Minn. 114). In this case an employee met injuries because of a piece of coal upon a step leading to the locomotive cab. The Court held this did not constitute a violation of either Act, and said on page 690 of the opinion:

> "Plaintiff also contended that the federal 'Boiler Inspection Act,' so-called (U. S. Comp. St. §§ 8630-8639), as amended in 1915 (U. S. Comp. St. §§ 8639a-8639d), so as to 'apply to and include the entire locomotive and tender and all parts and appurtenances thereof,' and which makes it unlawful to use any locomotive engine propelled by steam power in moving interstate traffic unless the boiler and appurtenances thereof are in proper condition and safe to operate, and providing for inspection from time to time, creates a liability on the facts of this case. We think this act must be construed, as was the Safety Appliance Act, so as not include cases where some

> foreign substance has found a temporary lodgment upon the appliances of the locomotive or tender, and which is not the result of the ordinary use of such instrumentalities, but, came there accidentally from some unforeseen cause."

Slater v. *Chicago, St. P., M. & O. Ry. Co.*, 178 N. W. 813 (146 Minn. 390). In this case the plaintiff met his injuries because a trespasser without the knowledge of the railroad displaced an ice bunker so that it projected upon the running board. On page 814 of the opinion the Court said:

> "Does the fact that a trespasser surreptitiously has placed a temporary obstruction like a loose board or cover upon a running board of a railroad car show a violation of the act referred to? We think not. The running board itself was secure and mechanically perfect. There is no hint of any defect therein either as to material, workmanship, or design. The statute ought not to be construed as guaranteeing against the acts of trespassers, at least not unless such acts render the running board itself mechanically insecure. Sleet makes a running board insecure or unsafe for use; yet, we apprehend, it will not be contended that the Safety Appliance Statute is violated if a brakeman slips upon a running board coated with ice during a sleet storm."

The Supreme Court of Illinois in *C., R. I. & P. Ry. Co.* v. *Benson*, 352 Ill. 195 (185 N. E. 244) held the Safety Appliance Act was not violated where wire was wrapped around the grabirons. The Court said on page 200 of the opinion:

> "The grab-irons or hand-holds on the car in question complied with this section of the act. The wire which had been placed thereon by some person was no part of the grab-iron. (*Reeves* v. *C., S. P., M. & O. Ry. Co.*, 179 N. W. 689; *Slater* v. *C., S. P., M. & O. Ry. Co.*, 178 id. 813; *Craver* v. *Franklin Cotton Mills*, 145 S. E. 570.)"

Harlan v. *Wabash Ry. Co.*, 73 S. W. (2d) 749 (Supreme Ct. of Mo. 1934). It was claimed in this case that the

failure of fellow employees to close a trap door in the floor of the cab over the stoker constituted a violation of the Boiler Inspection Act and the Safety Appliance Act. The Court said, on pages 752 and 753 of the opinion:

> "Defendant contends, and we think correctly so, that the facts proven do not show or constitute a violation of the Boiler Inspection Act, under our ruling in *Riley* v. *Wabash Ry. Co.*, 328 Mo. 910, 44 S. W. (2d) 136, 139. The evidence here does not show any mechanical defect from use or originally in the engine or any appliance thereof. It was not a mechanical defect or any faulty construction to have a trapdoor in the floor of the engine cab for the purpose of affording access to the coal conveyor operating underneath the floor. Such was proper and necessary in case this mechanical stoker became clogged or needed adjustment of repair. The trapdoor was without defect and operated safely in the way and for the purpose intended. It was intended to be closed when not in use and the engine became 'unsafe to operate in the service to which the same was put' only because of the negligent act of leaving the trapdoor open when it ought to have been closed. The Boiler Inspection Act (45 U. S. C. A. § 22 *et seq.*), like the Safety Appliance Act (45 U. S. C. A. § 1 *et seq.*) was not intended to cover the negligent act of an employee in the use or misuse of an appliance safe and proper in itself and free from mechanical defects."

In *Riley* v. *Wabash Ry. Co.*, 44 S. W. (2d) 136 it was contended that placing a clinker hook on the tender tank in such a way as to make it an element of danger constituted a violation of the Safety Appliance or Boiler Inspection Acts. The Court said on page 141 of the opinion:

> "The gist of plaintiff's instruction, authorizing a verdict against defendant, is that if the jury found that the servants or agents of defendant company, placed the clinker hook on top of the tender tank in a loose, insecure, and unsafe position, so as to render the tender unsafe to operate, resulting in plaintiff's injury, then defendant was liable, not having complied

with the Boiler Inspection Act. The instruction does not require the jury to find that there was any defect, or that the tender was not properly equipped. All the jury was required to find was that defendant's servants or agents had misplaced the clinker hook, thereby creating the unsafe condition.

"This is not sufficient for a recovery under the Safety Appliance Act or Boiler Inspection Act."

IV.

The Amendment of August 11, 1939, Was Not Retroactive.

The accident in this case happened on February 6, 1937. The suit was filed in Chicago on January 27, 1939. The trial before the jury was completed in June of 1939, and on June 10, 1939 (R. 12) the appeal was perfected to the Appellate Court. It is to be seen, therefore, that two months before the statute was amended the trial of the above case had been completed. The court instructed the jury *at the request of Petitioner* (R. 175) that assumed risk was a defense which the defendant was required to establish by the greater weight of evidence (R. 179). The Petitioner recognized, thereby that assumed risk was a complete defense if properly established.

Counsel rely upon Section 3 of the Federal Employers Liability Act relating to contributory negligence which uses the terms "in all actions hereafter brought." It is difficult to follow the reasoning of counsel for Petitioner when they allude to that Act. That Act was adopted in 1908 and the amendment in question did not take effect until long after the suit at bar was tried and judgment had been entered in the trial court.

This court, in the case of *Winfree* v. *Northern Pacific*, 227 U. S. 296, held that the first Workmen's Compensation Act was not retroactive. The cause of action accrued in the Winfree case before the statute was passed. An employee working as an engineer met his death while work-

ing in interstate transportation. The court held an action could not be maintained under the Federal Employers Liability Act of 1908, and in so doing said:

> "* * * statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required."

This court, since its very earliest decisions, has recognized that it is a fundamental rule of statutory construction that a statute is not to be given a retroactive effect unless by the plain words of the statute such a construction is unavoidable. In the early case of *United States* v. *Heth*, 3 Cranch 399, the Collector of Customs prior to the enactment of the statute on June 30, 1800 had received certain sums of money for which he was to be compensated on a percentage basis. By the act of June 30, 1800 his compensation was restricted to a smaller commission of 2½% on the amounts collected. The court held the statute did not affect the prior transactions and in so doing said on page 413 of the opinion:

> "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Murray v. *Gibson*, 56 U. S. 421 (15 Howard). In this case a statute of Mississippi passed in 1846 declared that no record of any judgment recovered in a foreign court

against a citizen of Mississippi should be received as evidence after the expiration of three years from the time of rendition of such judgment. This court held that the statute had no application to a judgment rendered before its passage. In so doing the court said on page 423 of the opinion:

> "As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only."

McEwen v. Den, 65 U. S. 242 (24 Howard). Prior to 1856 under the laws of Tennessee a deed could not be acknowledged or proven in another state before the Clerk of a court. In 1856 a law was passed allowing this to be done. The court held that this statute was prospective only and in so doing said on page 244 of the opinion:

> "It is insisted, that the act is retrospective as well as prospective in its operation, and covers the acknowledgment made in 1839, in New York.
>
> "We think the statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to wit, that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears."

Sohn v. Waterson, 84 U. S. 596, (17 Wallace): The appeal in this case was from the Circuit Court for the District of Kansas. A right of action had accrued in 1854. The statute of limitations passed in 1859 barred all actions of the character involved unless commenced within two years next after the cause of action accrued. The court held that the statute did not affect the right of action which accrued in 1854 but that the two-year period started to run from the date of the statute. In so doing the court said on pages 598 and 599 of the opinion:

> "The plaintiff contends that the statute of Kansas cannot apply to actions which accrued more than two

years before its passage, because it would cut them off and defeat them altogether, and would thus impair the obligation of contracts.

"A literal interpretation of the statute would have this effect. But it is evident that the legislature could not have had any such intention. The court below held, that as the defendant was a resident of Kansas when the act took effect, the time of limitation began to run in his favor as against the present cause of action from that period; and that the action might have been brought at any time within two years afterwards; and not having been brought within that period it was barred. In other words, the court held that the act was prospective in its operation, and affected existing causes of action only from the time of its passage. This seems to us a reasonable construction and one that prevents the legislative intent from being frustrated. 'Words in a statute,' says Justice Paterson, 'ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' And this rule is repeated by this court in *Harvey* v. *Tyler*, where it is said: 'It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect.'"

Chew Heong v. *United States*, 112 U. S. 536. A statute passed in 1882 prescribed that a Chinese laborer should present a certificate on reentering the United States and that the certificate so prescribed would be the only evidence permissible to establish his right of entry into the United States. Prior to the enactment of this statute Heong had left the United States. The court held that the statute of 1882 did not affect his rights and that Heong could return under the terms existing when he left. In so doing the court said on page 559 of the opinion:

"We have stated the main reasons which, in our opinion, forbid that interpretation of the act of Congress. To these may be added the further one, that

the courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In *United States* v. *Heth*, 3 Cranch, 398, 413, this court said, that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the settled doctrine of this court. *Murray* v. *Gibson*, 15 How. 421, 423; *McEwen* v. *Den*, 24 How. 242, 244; *Harvey* v. *Tyler*, 2 Wall. 328, 347; *Sohn* v. *Waterson*, 17 Wall. 596, 599; *Twenty Per Cent. Cases*, 20 Wall. 179, 187."

In the recent case of *United States* v. *St. Louis etc. Ry. Co.*, 270 U. S. 1, the same view was taken by the Court. The opinion in that case was rendered by Mr. Justice Brandeis. The suits in this case were for services rendered the War Department prior to federal control. The suits were instituted in the court of claims more than three years after the cause of action accrued but within six years. The Transportation Act of 1920 fixed a three-year limitation period. In holding the act not retroactive Justice Brandeis rendering the opinion for the court said, page 3:

"That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure, *United States Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435. There is nothing in the language of paragraph 3 of § 16, or in any other provision of the Act, or in its history, which requires us to hold that the three-year limitation applies under any circumstances, to causes of action existing at the date of the Act."

V.

There Is No Evidence in the Record to Support a Finding of Negligence on Behalf of the Defendant.

The answer of the jury to the special interrogatory definitely eliminates any claim of negligence because of a defective water tank.

Petitioner in support of his point III refers to the record as follows: R. 27-28, 34-35, 100-101, 118, 125, 130-131. An examination of those parts of the record discloses the following:

At pages 27 and 28 the testimony of the Petitioner was to the effect that there was a crack or leak in the tender. It was unequivocal testimony which the jury by their answer to the special interrogatory found to be false. That reference to the record does not support Petitioner's statement.

The record, at pages 34 and 35, is the testimony of Petitioner to the effect that the Petitioner did not splash the water over when he was putting the water in the tank on the tender.

At pages 100 and 101 the engineer, A. E. Granger, testified that when the water gets to the top of the tank the force of the water is such that it will splash out of the manhole just as when water is coming out of a faucet.

At page 118 of the record the testimony of conductor P. K. Holton was to the same effect as that of engineer Granger. At page 125 of the record Francis Smith, a fireman, testified that such splashing of the water when it comes in with force was the ordinary occurrence. At pages 130 and 131 brakeman Findley testified to the same common and ordinary occurrence.

It is to be seen, therefore, that the reference to the record does not demonstrate that "it was established to the

point of demonstration that the water and ice accumulated because the employee who previously filled the tank had negligently permitted an overflow." The record is silent as to the identity of the so-called previous employee. There is no testimony whatsoever that there was "an overflow."

In order to sustain a recovery there must be some evidence of negligence of the defendant. The record is utterly lacking in this essential.

But even if the ice had been put there negligently through the act of other employees Petitioner's full knowledge of it constituted an assumption of the risk by him. *Missouri Pacific* v. *Aeby*, 275 U. S. 426; *Hatton* v. *New York, N. H. & H. R. Co.*, 261 Fed. 667 (C. C. A. 1st); *Wichita Falls & S. R. Co.* v. *Wade*, 57 S. W. (2d) 332 (Ct. of Civ. App., Texas, 1932); *Missouri Pacific* v. *Lane*, 56 S. W. (2d) 175 (186 Ark. 807).

VI.

After the Verdict Establishing Petitioner's Perjury There Was Nothing in the Record to Sustain the Charges of the Complaint.

We have no disagreement with the argument that the trial court should have submitted the case to the jury, but once the jury found from all the evidence that the plaintiff's testimony was false when he claimed that there was a leak or crack in the tender, under the undisputed evidence the trial court should have entered a judgment for the defendant notwithstanding the verdict as was ordered by the Appellate Court. There was no evidence of negligence of the Respondent with respect to the ice. The evidence shows that Petitioner, only, knew of this ice and he reported it to no one. The Respondent, so far as this record shows, had no knowledge of its presence and there could be no recovery until it did have notice of the condition. *Hatton* v. *N. Y., N. H. & H.*, 261 Fed. 667, 669 (C. C.

A. 1st); *Schilling* v. *D. & H. R. Co.*, 114 F. (2d) 69 (C. C. A. 2d); *Great Northern Ry. Co.* v. *Johnson*, 207 Fed. 521 (C. C. A. 8th).

In the case of *Tobin* v. *Detroit, T. & I. R. Co.*, 13 N. E. (2d) 739 (57 Ohio App. 306) the Court held there was no violation of the Safety Appliance Act because of frost on a running board. In so doing the Court said on page 744 of the opinion:

> "Generally stated, the law is that the falling of snow and the natural formation of ice does not in itself constitute evidence of negligence of a railroad in respect to its property, but negligence may occur in relation to snow and ice, and we see no reason why the rule should not apply to frost.
>
> In every instance, however, there must be actual or constructive knowledge by the carrier, of the snow, ice, or frost attended by the carrier's negligent act or omission, before there can be liability. In this case there was no such situation."

On the whole record there was nothing for the jury after they found no defect in the tender.

Conclusion.

Petitioner's complaint in great detail charged negligence of the Respondent in supplying a tender that was cracked and leaked. The Petitioner, on the trial of the case, testified to such a story at great length, and to that story only, and the trial of the case almost in its entirety centered about that charge. The jury made a special finding of fact that there was no such leak or crack in the tender and thereby, without qualification, branded all the Petitioner's testimony in this regard as false. On that charge of a violation of the Safety Appliance Act there clearly could be no recovery. There was no evidence of any other facts known to the Respondent which would constitute negligence.

Can it be that the Petitioner may come into court in a

trial, admitted to be fair, and tell a story, found to be false by a jury of his peers, and now be permitted to proceed on an issue injected into the case after his dishonor has been exposed and the attempt to corrupt the legal processes has been frustrated? It is submitted that he ought not and that certiorari be denied.

Respectfully submitted,

H. Victor Spike,
Silas H. Strawn,
Harold A. Smith.
For Respondent.